

**THE ADA and REASONABLE
ACCOMMODATION**

Presented by
Mary M. Tiernan
EEOC Philadelphia District Office

**The Americans with Disabilities
Act (ADA)**

- Title I prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in all aspects of employment.
- Covers employers with 15 or more employees
- Non-retaliation provision as with all statutes enforced by EEOC

**Americans with Disabilities Act-
Definition of "Disability"**

- A physical or mental impairment that substantially limits a major life activity;
- A record of such an impairment;
- Being regarded as having such an impairment
- But, the ADA Amendments Act the changed the meaning of the terms "major life activities" and "substantially limits," as well as the definition of "regarded as disabled".

Impairment

➤ What is an impairment:

- A physiological disorder or condition
- A mental or psychological disorder

ADA violation?

- Acme Widgets refuses to hire Mrs. Road Runner because her husband has multiple sclerosis and the company is afraid she will have to take too much time off to care for her husband. Did the company violate the ADA?
- Acme decides to hire Mrs. Road Runner. Two months later, she asks for time off to care for her husband as a reasonable accommodation. What should Acme do?

Association

- The ADA prohibits discrimination against an individual based on their "association" with a person who has a disability (e.g., family member)

Association

- Employer is not required to provide a reasonable accommodation to an employee based on that person's association.
- FMLA leave

The Americans with Disabilities Act (ADA) Amendments Act of 2008 (effective 1/1/09)

- The purpose of the Act:
 - To restore the ADA's broad protections
 - To reject the Supreme Court's view that "disability" should be determined by reference to the effect of using mitigating measures
 - To reject the Supreme Court's holding that the ADA required a "demanding standard" for coverage and requires that an impairment "severely restrict" major life activities
 - To express Congress's expectation that EEOC will revise its regulation defining "substantially limits" as "significantly restricted"

ADAAA

- But remember ---Section 2(b)(5) of the ADA Amendments Act states that "**the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and . . . the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.**"

ADAAA

- Section 3(4)(A) provides that the definition of disability “shall be construed in favor of broad coverage to the maximum extent permitted by the terms of [the ADA].”

- The limitation imposed by an impairment must be important
- But the limitation does not have to be severely restricting or significantly restricting the ability to perform a major life activity to qualify as a disability.

• See 2008 Senate Managers' Statement at 6-7 & n.14, 2008 House Committee on Educ. and Labor Report at 9-10

Major Life Activities & ADAAA

- This list is not exhaustive:
 - Walking
 - Hearing
 - Seeing
 - Learning
 - Breathing
 - Caring for oneself
 - Performing manual tasks
 - Lifting
 - Working
 - Bending
 - Reading
 - Communicating

Major Life Activities & ADAAA

- Includes major bodily functions such as:
 - functions of the immune system,
 - normal cell growth,
 - digestive, bowel, bladder,
 - neurological, brain,
 - respiratory, circulatory,
 - endocrine, and
 - reproductive functions

Definition of "Disability" (cont.)

- Definition of "disability" construed broadly
- Mitigating measures (other than ordinary corrective lenses) should not be considered
- Impairment can be disability even if **episodic or in remission**

Mitigating Measures

Mitigating measures include:

- (1) medication, medical supplies and equipment, low vision and hearing devices, prosthetics, mobility devices, etc.
- (2) Use of assistive technology
- (3) Reasonable accommodations
- (4) Learned behavioral or adaptive neurological modifications

Ordinary Eyeglasses or Contact Lenses

- Distinguished from "low vision devices," defined as "devices that magnify, enhance, or otherwise augment a visual image"
- Definition: "lenses that are intended to fully correct visual acuity or eliminate refractive error"

Impairments That Should Easily Be Found To Be Disabilities

- Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs
- Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy

Impairments That Should Easily Be Found To Be Disabilities

- Mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia

IMPAIRMENTS ON A SPECTRUM

- Some impairments will, as a factual matter, *not* fall into the category of impairments described above.
- With regard to these impairments in particular, a “condition, manner or duration” framework can be helpful. This is also where the comparison to “most people” is relevant.

MAJOR LIFE ACTIVITY . . . LIMITED IN “WORKING”

Being substantially limited in performing one specific job does not make a person substantially limited in working.

But if a person is substantially limited in a **class of jobs**, that person is covered under the first prong.

“Record of” a Disability [§ 1630.2(k)]

- 2nd definition of disability
- All of the changes reviewed for 1st definition (e.g., disregarding ameliorative effects of mitigating measures) would apply to a “record of” disability
- Probably much less likely to need this definition for coverage given expansion of 1st and 3rd definitions of disability
- Individuals with “record of” disability may be entitled to reasonable accommodation

"Regarded as" (cont.)

- Regarded as coverage NO LONGER requires a showing that an employer believed the impairment substantially limited a major life activity
- Only two elements:
 - Employer took employment action
 - Because of an individual's actual or perceived impairment

"Regarded as" (cont.)

- Employer can challenge a claim it regarded person as having a disability by showing that the impairment at issue is BOTH transitory and minor
- Transitory: Lasting 6 months or less
- Whether impairment is transitory and minor determined objectively
- Regarded as --not entitled to reasonable accommodation

"TRANSITORY AND MINOR"

- An impairment that may last for 6 months or less, but is not minor, IS covered.
 - An impairment that is minor, but will last for more than 6 months, IS covered.
- 29 CFR §1630.15(f)

- **Also – qualification standards:** A covered entity may not use qualification standards that screen out individuals with disabilities, on the basis of disability . . . ***unless*** the qualification standard is job related for the position in question and consistent with business necessity.
29 CFR §1630.10(a)

So how can you recognize a mental health impairment?

- I can't give one answer
➤ Remember case by case analysis, confidentiality, medical exam restrictions
➤ www.eeoc.gov
➤ JAN is another great resource
The Job Accommodation Network
➤ <http://www.jan.wvu.edu/>
➤ **1-800-526-7234**

<http://www.jan.wvu.edu>

- **Bipolar disorder** "is a medical illness that causes extreme shifts in mood, energy, and functioning.
➤ A chronic and generally life-long condition with recurring episodes of mania and depression that can last from days to months that often begin in adolescence or early adulthood, and occasionally even in children."
• Estimates indicate there are 10 million American adults diagnosed with bipolar disorder.

<http://www.jan.wvu.edu>

- **Borderline personality disorder (BPD)** is "an often misunderstood, serious mental illness characterized by pervasive instability in moods, interpersonal relationships, self image, and behavior. It is a disorder of emotional dysregulation. This instability often disrupts family and work, long-term planning, and the individual's sense of self-identity."
- Estimates indicate that 1-2% of American adults have BPD.

<http://www.jan.wvu.edu>

- **Major depression** is "persistent and can significantly interfere with an individual's thoughts, behavior, mood, activity, and physical health. Among all medical illnesses, major depression is the leading cause of disability in the United States and many other developed countries."
- Estimates indicate there are 15 million American adults with major depression.

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- **Obsessive compulsive disorder (OCD)**
"occurs when an individual experiences obsessions and compulsions for more than an hour each day, in a way that interferes with his or her life."
- Estimates indicate that 2% of American adults have OCD.

<http://www.jan.wvu.edu>

- **Panic disorder** occurs when a person "experiences recurrent panic attacks, at least one of which leads to at least a month of increased anxiety or avoidant behavior. Panic disorder may also be indicated if a person experiences fewer than four panic episodes but has recurrent or constant fears of having another panic attack."
- Estimates indicate that 2 to 5 percent of American adults have panic disorder.

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- **Post traumatic stress disorder (PTSD)** is "an anxiety disorder that can occur after someone experiences a traumatic event that caused intense fear, helplessness, or horror. While it is common to experience a brief state of anxiety or depression after such occurrences, people with PTSD continually re-experience the traumatic event; avoid individuals, thoughts, or situations associated with the event; and have symptoms of excessive emotions."

<http://www.jan.wvu.edu>

- People with this disorder have these symptoms for longer than one month and cannot function as well as they did before the traumatic event. PTSD symptoms usually appear within three months of the traumatic experience; however, they sometimes occur months or even years later."

- Estimates indicate that 2-9% of American adults have PTSD; this includes 15-30% of veterans.

<http://www.jan.wvu.edu>

- **Schizophrenia** "often interferes with a person's ability to think clearly; to distinguish reality from fantasy; and to manage emotions, make decisions, and relate to others."

- Estimates indicate there are two million American adults with schizophrenia.

Qualified Employee or Applicant

- Can perform the essential functions of the job in question, with or without a reasonable accommodation

Essential Functions

- These are the fundamental job duties.
- A function may be essential for several reasons, for example:
 - The job exists to perform that function
 - There are a limited number of people to perform the function
 - The job is highly specialized

Marginal Functions

- tasks or assignments that are tangential and not as important

If an applicant or employee cannot meet a specific qualification standard because of a disability

- Employer must show the standard is "job-related and consistent with business necessity."
- This ensures that the qualification standard is a legitimate measure of an individual's ability to perform an essential function of the specific position the individual holds or desires

➤ If an employer cannot show that a particular standard is "job-related and consistent with business necessity," the employer cannot use the standard to take an adverse action against an individual with a disability.

ACCOMMODATION REQUESTS



Reasonable accommodation

➤ Defined:

- A reasonable accommodation is a change in the workplace, or in the way things are usually done, that provides equal employment opportunities for individuals with disabilities
- **General rule:** An employer must provide a reasonable accommodation to an individual with a disability if requested and if doing so does not pose an undue hardship

Reasonable Accommodation

- Modifications to the job application process, the work environment, or the privileges and benefits of employment
- Must enable the disabled employee to perform the essential functions of the position
- May not cause an undue hardship to employer
- Request may be made by person or be readily apparent
- Accommodation process should be timely and cooperative

When Does it Start?

- When a qualified individual with a disability makes a request
- When the accommodation is readily apparent

Examples of Reasonable Accommodations To Apply And/Or Interview For A Job.

- providing someone to read or interpret application materials for a person who has limited ability to read or to understand complex information;
- demonstrating, rather than describing, to the applicant what the job requires;
- modifying tests, training materials, and/or policy manuals; and
- replacing a written test with an "expanded" interview. An expanded interview allows applicants who have difficulty describing their abilities to demonstrate their skills at the employment office or work site.

Examples of Reasonable Accommodation

- Making facilities accessible
- Restructuring the job, reallocating marginal functions
- Altering when and how an essential task is performed
- Part time or modified work schedules
- Flexible leave
- Obtaining or modifying equipment or devices
- Reassignment to a vacant position

Examples of Accommodations

- **Training for the Job**
- The employer may:
 - have the supervisor give instructions at a slower pace;
 - give the employee additional time to finish the training;
 - break job tasks into sequential steps required to perform the task;
- use charts, pictures, or colors;

Examples of Accommodations

- provide a tape recorder to record directions as a reminder of steps in a task;
- use detailed schedules for completing tasks; and
- provide additional training if there are any on-the-job changes.
- Job coach

Reasonable Accommodation

- Employer is not required to:
 - Eliminate essential job functions
 - Lower quality or production standards
 - Provide a new supervisor
 - Excuse bad behavior
 - Monitor medications
 - Provide personal use items such as glasses or hearing aids

Examples of Accommodations

- **Acquisition or Modification of Equipment or Devices**
- **Example:** A receptionist with an intellectual disability and fetal alcohol syndrome has difficulty remembering the telephone numbers of office workers when transferring calls.
- **Work Station Placement:**
- **Example:** A data entry employee with an Intellectual disability and Attention Deficit Disorder from a large open area where employees work side-by-side has difficulty concentrating

Reasonable accommodation Examples

- leave for doctors' appointments and/or to seek or recuperate from treatment
- periodic breaks or a private area to rest or to take medication
- adjustments to a work schedule
- permission to work at home
- modification of office temperature
- permission to use work telephone to call doctors
- reallocation or redistribution of marginal tasks to another employee

Examples of Accommodations

- **Modified Work Schedule**
- **Help in Understanding Job Evaluations or Disciplinary Proceedings**
 - An employer may allow the employee to bring someone to a job evaluation or disciplinary meeting to help him ask questions and to explain the job evaluation results or the purpose of the meeting.

Reassignment

If not possible to accommodate employee in own job, must consider reassignment to a vacant, funded position for which the individual is qualified
Not limited to facility or commuting area

Reassignment

Take affirmative steps -
Discuss with managers,
Contact Personnel,
Contact other offices,
Contact Headquarters

Request for a Reasonable Accommodation?

- An employee submits a note from a health professional stating that he is having a stress reaction and needs one week off. Subsequently, his wife telephones the Human Resources department to say that the employee is disoriented and mentally falling apart and that the family is having him hospitalized. The wife asks about procedures for extending the employee's leave and states that she will provide the necessary information as soon as possible but that she may need a little extra time.

Request for a Reasonable Accommodation?

- An employee asks for time off because he is "depressed and stressed."
- Same situation, but the employee requests to be transferred to a job free from inordinate stress and to be transferred away from some co-workers who "stress me out."

- The request for a reasonable accommodation must be communicated to the employer. However, no magic words (e.g., "reasonable accommodation" or "ADA") are needed. The request may be made in "plain English," orally or in writing, and it may come from a family member, friend, job coach or other representative.

Obtaining medical information to support the employee's request

- When a person's disability is not obvious, the employer may ask the person to provide reasonable documentation about his/her disability. The employer is entitled to know that the person has a covered disability for which a reasonable accommodation is needed. The employer may not request documentation unrelated to the disability at issue, or the accommodation requested.

- **Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with a disability has not asked for one?**

- Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodatio

Reasonable Accommodation?

- An employee requests "indefinite leave" to accommodate her bipolar disorder.
- An employee requests six to eight weeks to accommodate her bipolar disorder.
- An employee requests 14 weeks to accommodate her bipolar disorder but the state says she's exceeded her FMLA leave and refuses to grant any additional time.

What is an Undue Hardship?

- An employer is not obligated to provide an accommodation if doing so is cost prohibitive to its ongoing operation or overly disruptive

Disability Related Questions and Medical Exams

- General Principles:
 - Pre-offer – no questions or exam
 - Post-offer – all questions/exams are OK as long as required of all applicants in same job category
 - During employment – must be job-related and consistent with business necessity
 - To process reasonable accommodation request – if disability and/or need for accommodation not obvious or already known.
 - GINA-Can't ask about genetic information/family medical history

Disability Related Questions and Medical Exams

➤ Job Interview/Prohibited Questions

- About an applicant's impairment
- About an applicant's use of medications
- About an applicant's worker's comp history
- About an applicant's mental health treatment

Disability Related Questions and Medical Exams

➤ Job Interview/ Permissible Questions:

- | | |
|--|---|
| <ul style="list-style-type: none">• Whether the applicant can perform the essential functions of the job• Whether the applicant currently uses drugs illegally• Whether the applicant has engaged in violence in the workplace | <ul style="list-style-type: none">• Why the applicant left a prior job• Whether the applicant will need a reasonable accommodation for the application process• Whether someone with an obvious disability will require a reasonable accommodation to perform the job |
|--|---|

An employer may ask questions if they relate to performance of the job--examples

- whether the applicant can put files in alphabetical order; and
- whether the applicant can place items in numerical order.

What if employee volunteers information?

- An applicant for a position as an office clerk voluntarily discloses to the employer that she has an intellectual disability and will need some type of work plan or technological device to remind her what her duties are.
- What should the interviewer do?

Disability Related Questions and Medical Exams

- Post-offer: "open season"
 - All entering employees are subjected to the same exam/inquiry
 - Information is kept confidential

- The fact that an applicant has a disability may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety.

Disability Related Questions and Medical Exams

➤ During employment

- Employer must have a reasonable belief based on objective evidence that the employee:
 - Will be unable to perform the job's essential functions because of a medical condition; or
 - Will pose a direct threat because of a medical condition

Direct Threat

➤ Direct threat requires individualized assessment

➤ Direct threat exists when:

- An individual poses a significant risk of substantial harm to the health or safety of him/herself or others because of the disability; and
- The risk cannot be reduced or eliminated with a reasonable accommodation

Direct Threat

➤ Factors to be considered:

- Nature and severity of the risk
- Severity of the potential harm
- Imminence of the potential harm
- Likelihood that the harm will occur
- Whether the risk can be eliminated or reduced with a reasonable accommodation.

Confidentiality of Medical Information

- Medical information about applicants and employees must be kept confidential
- Do not place medical info in personnel files
- Applies to medical and medical-related info, including request for reasonable accommodation
- Limited exception where disclosure allowed (example, to provide an accommodation)

ADA & Employer Tips

- Examine all job descriptions to ensure that they reflect only essential functions, thus making the process for reasonable accommodation easier, if needed.
- Train staff on interviewing applicants with disabilities (possibly including staff receiving applications/security guards).

ADA & Employer Tips

- Establish and maintain procedures for handling reasonable accommodation requests. Designating an Americans with Disabilities Act (ADA) Coordinator with management access and decision-making authority is important.
- Pay attention to the circumstances of required medical examinations and make sure that employee medical information is kept confidential and separate from personnel files.

ADA & Employer Tips

- Ensure that all employer-sponsored events, including trainings, retreats and social gatherings, are accessible to people with disabilities. Programs must always be held in accessible locations and publications must be available in accessible formats.
- Review policies and procedures for promotions, transfers, layoffs and compensation to ensure that they are as inclusive as possible.
- Make sure that any benefits packages are not discriminatory.

ADA & Employer Tips

- Conduct an internal architectural barriers audit, looking for whether there are physical barriers in your workplaces that may limit employees with disabilities.
- Remember that the ADA covers owners, operators and lessees – so it is important to review contracts and leases.
- Recognize that you need not become an expert in every possible disability and accommodation. Reach out and build relationships with disability organizations. Use them as resources both for identifying potential employees and gathering information about disability issues.

Performance Standards

- Employer may apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that it applies to employees without disabilities

- A reasonable accommodation may be required to assist an employee in meeting a specific production standard
- Lowering or changing a production standard is not considered a reasonable accommodation

Practical Guidance

- Employers should give clear guidance to an employee with a disability (as well as all other employees) regarding the quantity and quality of work that must be produced and the timetables for producing it.

Evaluation Criteria

- **An employer should use the same evaluation criteria for employees with disabilities as for employees without disabilities**

Practical Guidance

- An accurate assessment of the employee's performance may, in some cases, alert the employee that his disability is contributing to the problem.
- This may lead the employee to request reasonable accommodation to address the problem and improve performance, which can benefit both the employee and the employer

EXAMPLE

- Susan works for a state government. She did not disclose her bipolar disorder, even when she begins having performance problems that she believes are disability-related.
- Supervisor Sam counsels her about the performance problems, but they persist. Sam warns that if her work does not show improvement within the next month, she will receive a written warning.
- Sally says she has a disability and asks for reasonable accommodation.
- What should Sam do?

- Sam should discuss the request and how the proposed accommodation will help improve the employee's performance.
- Sam also may ask questions or seek medical documentation that the employee has a disability (but remember not a fishing expedition).
- Sam does not need to rescind his oral warning or his requirement that the employee's performance must improve.
- But, delaying the one-month period to evaluate the employee's performance pending a decision on her request for reasonable accommodation will enable the employer to assess the employee's performance accurately.

- Employer may proceed with the discussion or evaluation
- Employer should begin the "interactive reasonable accommodation process"
- Discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it.

- If a reasonable accommodation is needed to assist an employee in addressing a performance problem, and the employer refuses to provide one, unless employer can prove undue hardship, the employer has violated the ADA

Must an employee with a disability perform a job in the same manner as a non-disabled employee?

- Not necessarily
- Many times an essential function can be performed in different ways (including with reasonable accommodation)
- An employee who must use an alternative method of performance because of a disability must be evaluated accordingly.
- An employer is not required to allow use of an alternate method that would impose an undue hardship.

Practical Guidance

- *If an employee states that her disability is the cause of the performance problem, the employer could follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance.*

Practical Guidance

- *If the employee does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level*

Practical Guidance

- *Ideally, employees will request reasonable accommodation before performance problems arise, or at least before they become too serious.*
- *Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance*

➤ The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem

➤ **Employers cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment for the performance problem**

If an employee does not request an accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer

- tolerate or excuse the poor performance;
- withhold disciplinary action (including termination) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance

CONDUCT STANDARDS

If an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees.

➤ If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

- If the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard.
- The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability

Employers may prohibit

- Violence, threats of violence, stealing, or destruction of property
- Insubordination towards supervisors and managers
- Require that employees show respect for, and deal appropriately with, clients and customers.
- Inappropriate behavior between coworkers

Employers may prohibit

- Employees from sending inappropriate or offensive e-mails
- Using the Internet to access inappropriate websites
- Making excessive use of the employer's computers and other equipment for purposes unrelated to work;
- Require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts)
- Prohibit drinking or illegal use of drugs in the workplace

- An employer may enforce conduct rules that are not found in workplace policies, employee handbooks, or similar documents so long as they are: (1) job-related and consistent with business necessity, and (2) applied consistently to all employees and not just to a person with a disability.

Want more information about
EEOC and the laws we enforce?

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www.eeoc.gov

Thank you!

Mary M. Tiernan
Program Analyst
Philadelphia District Office
801 Market Street, Suite 1300
Philadelphia, PA 19107
(215) 440-2671
TTY: (215) 440-2610
Mary.Tiernan@eeoc.gov
